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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 641

ROBERT LUCAS, HELEN LUCAS, CYRENE D. LUCAS, ANNETTE LUCAS, and CYRENE D. LUCAS, as Guardian of the Estates of ROBERT B. LUCAS II, CYRENE DENISON LUCAS and JAMES LUCAS, Minors,

Petitioners,

vs.

L. S. HAMM, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, and FIFTH DOE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT L. S. HAMM IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court has jurisdiction under 28 U.S.C. Sec. 1257 to review by writ of certiorari the final judgment of the highest Court of a

state on the ground that petitioner has been denied due process of law, when the first time the question of such denial was raised was in a petition for rehearing in the highest Court of the state, which petition was denied without opinion.

2. Whether, in an action for negligence instituted in a state Court, a judgment dismissing the action for failure to state a cause of action under the law of the state is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States because the plaintiff is thus denied the opportunity to attempt to prove negligence.

ARGUMENT

Although we believe that this petition for writ of certiorari shows on its face that it is wholly without merit, it is perhaps a duty we owe the Court to state the reasons for our belief, even though the statement must necessarily be one of elementary principles of law. We do so, briefly.

I

12 U.S.C. SEC. 1257 DOES NOT AUTHORIZE REVIEW IN THIS CASE

Admittedly, the first time petitioners set up or claimed any right under the Fourteenth Amendment to the Constitution of the United States was in a petition for rehearing filed in the Supreme Court of

California after that Court had, by its final judgment, affirmed the judgment of the trial Court which dismissed the action after sustaining a special demurrer to the complaint on the ground that it failed to state a cause of action. [Petition pp. 9-10.]

This Court has repeatedly held that "it is too late to raise a Federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort." *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 596, 331; *Hanson v. Denckla*, 357 U.S. 235; *American Surety Co. v. Baldwin*, 287 U.S. 156.

Under some circumstances an exception to this rule may exist if the state Court of last resort actually decides the question. See e.g. *Grimes v. Ordman*, 234 U.S. 385. But, as the record shows, the Supreme Court of California decided this case solely on California law and denied the petition for rehearing without opinion.

If by any conception there were in the case a question of invasion of rights under the Fourteenth Amendment, it cannot with justification be said that the question did not arise until the Supreme Court of California rendered its decision. That Court decided the case on the defendant's demurrer for failure of the complaint to state a cause of action. It was the demurrer which was before the trial Court and upon which the latter based its judgment dismissing the action. Necessarily, there existed the opportunity to raise in the trial court any questions that might be involved in an order sustaining the demurrer.

It is submitted that 12 U.S.C. Sec. 1257 does not authorize review of the judgment of the Supreme Court of the State of California in this case.

II

NO RIGHTS UNDER THE FOURTEENTH AMENDMENT ARE HERE INVOLVED

If we understand petitioners' contention, it is that in California every plaintiff who files a complaint in which he alleges that the facts which he pleads constitute negligence has a right under the Fourteenth Amendment to attempt to prove negligence in a jury trial, even though the Supreme Court of California holds that the complaint does not state a cause of action because as a matter of law the facts pleaded do not constitute actionable negligence.

This Court has answered the contention:

> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of a state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of the plaintiff.
>
> "It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to

constitute the laws of the state as justifying the refusal."

Iowa Central Railway Company v. State of Iowa, 160 U.S. 389, 393.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
January 18, 1962.

Respectfully submitted,

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